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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1028

SCANWELL LABORATORIES, INC., *Petitioner,*

v.

DAVID D. THOMAS, Acting Administrator of the Federal Aviation Administration,

and

CUTLER-HAMMER, INC.,
AIRBORNE INSTRUMENT LABORATORY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF OF RESPONDENT CUTLER-HAMMER, INC.

INTRODUCTION

In its Petition for Writ of Certiorari, the Petitioner, Scanwell Laboratories, has described the opinion of the Court below for which it is now seeking review, the basis upon which the jurisdiction of this Court rests, and the questions which it now wishes to present for review by the Court. Respondent, Cutler-Hammer, Inc., does not consider it necessary to add further

material on these subjects and, therefore, elects, pursuant to Supreme Court Rule 40, to move directly to the Statement of the Case.

STATEMENT OF THE CASE

The United States Court of Appeals for the District of Columbia Circuit has confronted this case on two separate occasions, reported at 424 F.2d 859 (1970) [pp. A18-51] * and 521 F.2d 941 (1975) [pp. A1-17.] * Respondent, Cutler-Hammer, believes that little purpose would be served by reviewing the facts already set forth in the two Circuit Court opinions. However, discussion of the procedural posture of this case, as it now stands, is relevant.

After the first decision of the Court below and remand to the District Court for the District of Columbia, Scanwell amended its complaint. In its "Amended and Supplemental" complaint Scanwell Laboratories pled four separate and distinct causes of action. The first two (Counts I and II) involved only the United States. The last two (Counts III and IV) involved only Cutler-Hammer. The nature of these four causes of action may be summarized as follows:

Count I: Alleged that the Government's failure to follow certain procurement regulations constituted a breach of duty owed to Scanwell, and a tort, for which the United States was liable [the "tort" theory].

Count II: Alleged that the Government's failure to follow its procurement regulations also constituted a breach of an implied contract, for which the United States was liable [the "contract" theory].

Count III: Alleged that Cutler-Hammer had received the contract through the use of "unfair competition" and was "unjustly enriched" as a result, for which Cutler-Hammer should be liable.

Count IV: Alleged that Cutler-Hammer had sought the subject contract in order to restrain trade in violation of the anti-trust laws of the United States (§§ 1 and 2 of the Sherman Act, 15 U.S.C.), for which Cutler-Hammer should be liable.

Both the United States and Cutler-Hammer filed separate motions to dismiss the "Amended and Supplemental" complaint which were specifically directed to those portions of the complaint with which each party was concerned. Thereafter, the District Court issued separate orders which accomplished the following: Count II (the "contract" cause of action) was transferred to the United States Court of Claims; Counts I and III were dismissed for failure to state a claim upon which relief could be granted; and Count IV remained before the District Court. Following the issuance of these orders, Scanwell filed an Appeal to the Circuit Court seeking review of the orders dismissing Count I (against the United States) and Count III (against Cutler-Hammer). In order to obtain the necessary finality needed to proceed with the Appeal, Scanwell voluntarily dismissed with prejudice the last cause of action (Count IV) then remaining before the District Court.

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* Citation to pages in Appendix of Petition for Writ of Certiorari.

The United States and Cutler-Hammer responded to Scanwell's Appeal to the Circuit Court in separate briefs and arguments. The Circuit Court, in its decision issued on October 23, 1975, upheld the orders of the District Court in dismissing both Counts I and III. The Circuit Court's opinion reported at 521 F.2d 941 [pp. A1-17], dealt separately with the validity of the District Court orders pertaining to Counts I and III. It is this decision of the Circuit Court which is now the subject of Scanwell's Petition for Writ of Certiorari.

ARGUMENT

Petitioner's causes of action against the United States and Cutler-Hammer are, and always have been, treated as separate and distinct. Scanwell's causes of action against both defendants arose out of the award of a contract in which Scanwell was an unsuccessful bidder. The common ground between Scanwell's actions against the two defendants, however, stops at that point. Scanwell's complaint before the District Court, the District Court's orders in the case, the Appeal to the Circuit Court and the Circuit Court's decision, now the subject of this Petition, have all maintained and recognized the distinction between the various causes of action, and the particular law and facts relevant to each.

The Petition Does Not Seek Review of the Dismissal of Count III Involving Cutler-Hammer

Scanwell's Petition for Writ of Certiorari does not challenge, in any respect, the decision of the Circuit Court as it deals with the cause of action against Cutler-Hammer (Count III).

In the section of the Petition entitled "Question Presented", the Petitioner raises no issue of law, which can be read to concern the cause of action against Cutler-Hammer, either directly or by implication.

Similarly, in the section of the Petition entitled "Reasons for Granting the Writ", the Petitioner directs its argument to the measure of discretion a Government contracting officer may have in awarding a Government contract, and whether or not an abuse of that discretion properly constitutes a "tort" or "breach of an implied contract" for which the United States should be liable. These issues and the arguments related to them have absolutely no bearing on Scanwell's right to proceed against Cutler-Hammer on a theory of "unjust enrichment" or "unfair competition". Petitioner has directed its entire Petition to its case against the United States. As a result, there is nothing to which Cutler-Hammer can affirmatively respond in this brief, other than to point out the foregoing.

Rule 21 of the Court's procedure provides the means by which a Petitioner can notify the Court that a party to the action below may have no interest in the outcome of the Petition, and thereby relieve that party of the burden of replying to the Petition. In this case, Scanwell has failed to provide such a notification and yet it has raised no issues of law for Court review, which concern its cause of action against Cutler-Hammer. Rule 23(1)(c) provides that this Court shall consider only those questions presented in the Petition or "fairly comprised therein". *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 324-25 (1972); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 180 (1944). Respondent, Cutler-

Hammer, contends that the petition filed by Scanwell Laboratories raises no issue regarding any cause of action against Cutler-Hammer, and that none can be viewed as "fairly comprised" within the issues actually raised and argued. Respondent, Cutler-Hammer, therefore contends that the Petition of Scanwell Laboratories should be dismissed.

CONCLUSION

The Petition for Writ of Certiorari raises no issues of law, and provides no other basis or reason for the Court to review the decision of the United States Court of Appeals for the District of Columbia Circuit as it affirmed the dismissal of Count III, the only cause of action involving Respondent, Cutler-Hammer, Inc. Therefore, the Petition must be denied with respect to Respondent Cutler-Hammer.

Respectfully submitted,

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